

(1) Claimant has failed to establish by a preponderance of the credible evidence that he suffered an accidental injury arising out of and in the course of his employment. Claimant began working for respondent Beard Painting in 1981, doing commercial and

residential painting. Claimant testified that his work, particularly that on ladders, caused pain in his knees over the last two years of his work for respondent. He asserted that he has suffered repetitive trauma to his knees resulting in disability.

Claimant terminated his employment with respondent on June 23, 1992, after a disagreement between claimant and his brother, the owner. Claimant did not seek medical treatment for his knees until after he terminated his employment. He first saw Dr. Estivo on July 9, 1992. Dr. Estivo indicated claimant was unable to work as of that date and prescribed anti-inflammatory medication and physical therapy. Dr. Estivo examined claimant again on July 17th, August 6th, and September 1st of 1992. He referred claimant for a functional capacity evaluation performed on August 26, 1992. Dr. Estivo then released claimant to return to work as of September 2, 1992, with restrictions limiting claimant's ladder climbing and kneeling to less than one-third of the day and recommended that he not lift over sixty (60) pounds. Dr. Estivo diagnosed left quadriceps tendinitis and hamstring strain. He rated claimant's permanent partial impairment at three percent (3%) of each lower extremity.

Claimant was also examined by Dr. Bernard T. Poole at the request of respondent's attorney. Dr. Poole disagreed with Dr. Estivo's diagnosis. He found marked patellar overload in both knees with early degenerative arthritic changes in the patellofemoral joints. Dr. Poole concluded that the claimant's problems were congenital, not traumatic. According to Dr. Poole, claimant's condition was due to marked lateral patellar retinacular contractures with a laterally riding patella. He testified that the x-rays proved quite unequivocally that the problem was that of the abnormal patella with laterally riding patella contracture. He found no evidence of hamstring strain. He further testified that anything the claimant did would cause wear and tear including walking, sleeping and getting in and out of a car. In response to direct questions, he indicated that he could not say that the condition was either aggravated or accelerated by claimant's work activities.

From review of the testimony and records of the two testifying physicians, Dr. Poole and Dr. Estivo, the Appeals Board finds Dr. Poole's to be more convincing. Dr. Poole found objective evidence on x-ray. Dr. Estivo found no evidence from x-ray, but nothing in the record suggests that he considered the diagnosis reached by Dr. Poole. Dr. Estivo indicates his examination was relatively negative. He reached his diagnosis based upon complaints of pain in the left quadriceps and left hamstring region. His diagnosis does not appear to be as well substantiated as the diagnosis by Dr. Poole.

As previously indicated, Dr. Poole testified that the condition he found upon x-ray and examination was not caused by claimant's work activities. His description of the progression of claimant's congenital condition appears to be similar to that considered in Boeckmann v. Goodyear Tire & Rubber Co., 210 Kan. 733, 504 P.2d 625 (1972). In Boeckmann, the Court considered evidence that the claimant's osteoarthritic condition would progress regardless of claimant's activities. The evidence presented here is similar. Dr. Poole has testified that claimant's condition would worsen with any activity. From a review of the record as whole, the Appeals Board finds Dr. Poole's opinion to be more credible and finds that claimant has failed to meet his burden of establishing that he has suffered accidental injury arising out of and in the course of his employment with respondent.

(2) Having found that claimant failed to meet his burden that he suffered an injury arising out of and in the course of his employment, the award for temporary total disability, medical and unauthorized medical benefits should be reversed. Claimant has proven only that his work activities for respondent caused pain in his knee. He has not established that his temporary total disability or medical treatment resulted from accidental injury arising out of and in the course of his employment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated January 27, 1994, should be, and the same is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David M. Bryan, Wichita, Ks
James A. Cline, Wichita, Ks
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director